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IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,

Plaintiff/Respondent,

vs.

ALBERT RAY MOORE,

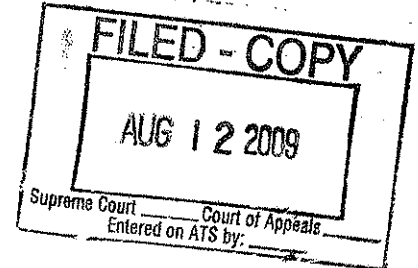
Defendant/Appellant.

S.Ct. No. 36033

OPENING BRIEF OF APPELLANT

Appeal from the District Court of the Fourth
Judicial District of the State of Idaho
In and For the County of Ada

HONORABLE MICHAEL MCLAUGHLIN,
District Judge



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II. STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from a judgment and sentence entered following a conditional *Alford* guilty plea to a single count of felony DUI.¹ Clerk's Record (R)144, 152.

B. Procedural History and Statement of Facts

Appellant Albert Moore was issued a misdemeanor citation for DUI and driving without privileges on September 3, 2006. R 10. On September 5, 2006, he entered a not guilty plea and a jury trial was set for February 21, 2007. R 3, 11. On September 18, 2006, his license was suspended for a year based upon the refusal of a BAC. R 12.

On January 23, 2007, a pre-trial conference was held. At that time, Mr. Moore waived his right to a jury trial and a court trial was set for May 14, 2007. R 4.

Then, on March 1, 2007, an amended complaint was filed charging misdemeanor DUI (second offense within 10 years) and driving without privileges. R 26. On May 11, 2007, a court trial was set for July 23, 2007. R 4. And, on the 23rd of July, the case was apparently set over to September 12, 2007, for a plea and sentencing hearing. R 30. However, on September 12, 2007, the case was reset for a jury trial on December 14, 2007. R 4. And, at the pre-trial conference, the trial date was again changed, this time to February 15, 2008. R 4.

Then, on January 4, 2008, a second amended complaint was filed charging felony DUI and DWP. CR 34. And, on January 10, 2008, Mr. Moore filed a motion to dismiss pursuant to I.C. § 19-3501(4). R 36.

A preliminary hearing was held, and on March 24, 2008, an information was filed

¹ *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160 (1970).

charging one violation of I.C. §§ 18-8004, 8005(5), felony DUI, and one violation of I.C. § 18-8001(4), misdemeanor driving without privileges. R 56. On March 26, 2008, Mr. Moore was arraigned on the amended complaint. R 62.

On May 16, 2008, Mr. Moore filed a brief in support of his motion to dismiss. Ex. on Appeal. The state responded. R 83.

A hearing was held on June 12, 2008, after which supplemental briefing was filed by both the state and defense. R 107, Exhibits on Appeal. Ultimately, the court denied the motion to dismiss. R 107-112.

In the order denying the motion to dismiss, the district court found that there was no statutory language to support a finding that the amendment of the charge from misdemeanor to felony renewed the statutory speedy trial period. R 109. However, in considering the causes of the delay, the prosecution's delay in researching Mr. Moore's history which resulted in the amendment of the charge, Mr. Moore's initial waiver of a jury trial and then the re-invocation of that right, and scheduling issues for a state's witness, the district court found that there was good cause for the delay and therefore no speedy trial violation. R 111-112.

Mr. Moore then entered a conditional *Alford* guilty plea to felony DUI and was sentenced to six years with one year fixed to run concurrently with the sentence he was serving in another case, *State v. Moore*, S.Ct. No. 35486. R 144-5. At the plea hearing, Mr. Moore stated that he wished to retain his right to appeal both the denial of the speedy trial motion and an issue of whether a prior North Dakota conviction could be used as a prior DUI. That issue was and is being litigated in his other case, *State v. Moore*, S.Ct. No. 35486. Tr. 12/1/08 p. 78, ln. 1-6, p.

79, ln. 2-14.² In accepting the guilty plea, the court informed Mr. Moore that if the North Dakota conviction is found invalid for purposes of a felony DUI conviction in Idaho in his other case, this case will return to the district court where it could either be dismissed or reduced to a misdemeanor charge. Tr. 12/1/08 p. 79, ln. 2-14. And, the court reinformed Mr. Moore of the ability to appeal the use of the North Dakota conviction at the sentencing hearing. Tr. 12/31/08 p. 98, ln. 12-17.

The district court did not order a new PSI for Mr. Moore, but rather relied on the PSI prepared for *State v. Moore*, S.Ct. No. 35486, Tr. 12/1/08 p. 89, ln. 16-18, Tr. 12/31/08 p. 91, ln. 24-25, p. 92, ln. 1-2. At sentencing, both the state and the defense requested a sentence of six years with one fixed to run concurrently with the sentence imposed in case No. 35486. Tr. 12/31/08 p. 93, ln. 14-18, p. 95, ln. 12-17. And, this was the sentence imposed. R 144-5.

This appeal timely followed. R 147.

III. ISSUES PRESENTED FOR REVIEW

1. Was Mr. Moore denied his federal and state constitutional rights to speedy trial by the 18 month delay without good cause between his arrest and the time he filed a motion to dismiss?
2. Was Mr. Moore denied his statutory right to speedy trial given the unexcused 18 month delay between arrest and the filing of his motion for dismissal?
3. Should this case be remanded based upon the decision in S.Ct. No. 35486 as to whether the prior conviction from North Dakota can be used in these Idaho DUI prosecutions?

² Mr. Moore has moved for consolidation of this case and case No. 35486.

IV. ARGUMENT

A. Mr. Moore was Denied his Federal and State Constitutional and State Statutory Rights to a Speedy Trial.

Mr. Moore was arrested and issued a citation on September 9, 2006. Eighteen months later, on January 10, 2008, he filed a motion to dismiss for speedy trial violation. This long delay, three times the statutory allowance of six months, was a violation of both his state and federal constitutional rights as well as his state statutory rights to a speedy trial. U.S. Const. Amend. 6, 14; Idaho Const. art. I, § 13; I.C. § 19-3501.

1. Standard of Review

The question of whether there was a violation of the right to speedy trial is a mixed question of fact and law. The appellate court defers to the trial court's findings of fact if supported by substantial and competent evidence and exercises free review of the trial court's conclusions of law. *State v. McKeeth*, 136 Idaho 619, 626, 38 P.3d 1275, 1282 (Ct. App. 2001), *rev. denied* (2002).

2. The 18 Month Delay Violated the Federal and State Constitutional Rights to a Speedy Trial.

The Sixth and Fourteenth Amendments of the United States Constitution guarantee a speedy trial. *State v. Davis*, 141 Idaho 828, 835, 118 P.3d 160, 167 (Ct. App. 2005). And, the Idaho Constitution guarantees "a speedy and public trial." Idaho Const. art. I, § 13; *State v. Davis*, *supra*.

The constitutional speedy trial guarantee is intended to minimize the possibility of lengthy incarceration prior to trial; to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail; and to shorten the disruption of life

caused by arrest and the presence of unresolved criminal charges. *State v. Davis, supra*, citing *United States v. Loud Hawk*, 474 U.S. 302, 311, 106 S.Ct. 648, 654 (1986); *United States v. MacDonald*, 456 U.S. 1, 8, 102 S.Ct. 1497, 1502 (1982).

Under both the federal and the state constitutions, the balancing test of *Barker v. Wingo*, 407 U.S. 514, 92 S.Ct. 2182 (1972), is used to determine whether a defendant's constitutional rights to a speedy trial were violated. *State v. Davis, supra*. Four factors are weighed: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of the right to a speedy trial; and 4) the prejudice occasioned by the delay. *Barker v. Wingo*, 407 U.S. at 530, 92 S.Ct. at 2192; *State v. Davis, supra*.

The constitutional right to a speedy trial applies throughout a formal criminal prosecution, from the time the accused is indicted, arrested, or otherwise formally accused to the time the charges are resolved or dismissed. *State v. Davis*, 141 Idaho at 836, 118 P.3d at 168, citing *Barker, supra*; *Doggett v. United States*, 505 U.S. 647, 655, 112 S.Ct. 2686, 2692-93 (1992), *MacDonald, supra*; *State v. Young*, 136 Idaho 113, 117, 29 P.3d 949, 953 (2001).

Applying the *Barker* factors, it is clear that Mr. Moore's constitutional rights to a speedy trial were violated.

a. Length of Delay

A delay of 18 months existed at the time Mr. Moore filed his motion to dismiss. Such a delay in a DUI case is presumptively prejudicial. *State v. Davis, supra*, (finding that an 18 month delay in prosecuting a DUI was of a length as to require judicial scrutiny of the remaining *Barker* factors). See also, *State v. Rodriguez-Perez*, 129 Idaho 33-37, 921 P.2d 206, 210-14 (Ct. App. 1996) (A delay of over 13 months sufficient to trigger judicial scrutiny for a complex conspiracy

charge.)

Moreover, the longer the delay the stronger the reasons must be to justify it. *State v. Hernandez*, 136 Idaho 8, 11, 27 P.3d 417, 420 (Ct. App. 2001). *See also, State v. Lund*, 124 Idaho 290, 292, 858 P.2d 829, 831 (Ct. App. 1993), “The longer the delay in a given case, the more weight will be given to this factor and the harder it will be to show good cause.” An eighteen month delay existed when Mr. Moore filed his motion to dismiss. By the time the motion was decided, he’d been subjected to nearly six more months of waiting for a trial date. This nearly two year delay is a very long delay and one that requires very substantial reasons for justification.

b. Reason for Delay

In evaluating the reasons for a delay, different weights are assigned to different reasons. *Davis, supra, citing, Loud Hawk*, 474 U.S. at 315, 106 S.Ct. at 656. Some reasons for delay are valid, such as the need for time to collect witnesses, oppose pretrial motions, or locate a missing defendant. *Id.* And, while an unavailable witness may be a valid reason for a delay, it is important to distinguish between a witness who is truly unavailable and one who would be inconvenienced by the trial setting. True unavailability suggests an unqualified inability to attend. *Id.*

A deliberate attempt to delay the trial in order to hamper the defense weighs heavily against the state. *Davis, supra, citing Barker*, 407 U.S. at 531, 92 S.Ct. at 2192. More neutral reasons such as negligence or court congestion weigh less heavily, but nonetheless weigh against the state because the ultimate responsibility for such circumstances rests with the state rather than the accused. *Davis, supra, citing Barker, supra; State v. Wavrick*, 123 Idaho 83, 89, 844 P.2d

712, 718 (Ct. App. 1992). Further, negligence is not automatically tolerable simply because the accused cannot demonstrate how the delay prejudiced him. *Davis, supra, citing Doggett*, 505 U.S. at 657, 223 S.Ct. at 2693-94. “Although negligence is weighted more lightly than a deliberate intent to harm the accused’s defense, it still falls on the wrong side of the divide between acceptable and unacceptable reasons for delaying a criminal prosecution. *Id.*”

The district court found three reasons for the delay in this case: 1) the state’s lack of diligence in researching Mr. Moore’s prior history; 2) Mr. Moore first requesting a court trial and then requesting a jury trial; and 3) the fact that the trial had been scheduled to accommodate the schedule of one of the state’s witnesses.

The first reason, the delay in researching the case, is negligence on the part of the state. This, as stated in *Davis*, falls on the wrong side between acceptable and unacceptable reasons.

The second reason cited by the court was Mr. Moore’s decision first to waive a jury trial and then to re-invoke that right. The court also mentioned that time was taken up by plea negotiations. While the court implicitly found that these delays could not be counted against the state, *State v. Stuart*, 113 Idaho 494, 745 P.2d 1115 (Ct. App. 1987), holds to the contrary. *Stuart* states: “Good cause means a substantial reason; one that affords a legal excuse.” 113 Idaho at 496, 745 P.2d at 1117. In *Stuart*, the delay in trying Stuart was attributed to Stuart having filed and then later abandoned a motion to dismiss. The Court wrote:

... The six-month time limitation for speedy trial under I.C. § 19-3501 does not represent a whimsical time frame. It is designed to accommodate a reasonable number of pretrial motions. Stuart asserted a single motion but abandoned it. Such action is not an appropriate ground for delaying the trial beyond six months. Trial courts must be diligent in securing compliance with time restraints. ...

Id.

In accord with *Stuart*, the time consumed by Mr. Moore's initial waiver of and then re-invocation of his right to a jury trial and plea negotiations should not be weighed against him in determining whether there was a speedy trial violation.

However, even if *Stuart* did not hold that pretrial motions do not excuse a failure to timely set a trial, in this case, the delay cannot be attributed to Mr. Moore's actions. Mr. Moore was arrested on September 3, 2006. R 10. The six month statutory window for trial therefore expired on March 3, 2007. Mr. Moore waived his right to a jury trial on January 12, 2007. R 24. And, just two days before the statutory speedy trial time would run, the state filed its first amended complaint. R 26. And, on May 1, 2007, nearly 8 months after his arrest, and well before Mr. Moore decided to re-invoke his right to a jury trial, the court had still not set the matter for a court trial. R 39. It was not until September 7, 2007, one year later and twice the statutory speedy trial time limit, that Mr. Moore requested to have a jury trial instead of a court trial. R 31. This year's delay cannot be attributed to Mr. Moore's re-invocation of his right to a jury trial, because he had not yet re-invoked that right. Further, nowhere in the record is there any indication that a trial date was postponed or reset based on Mr. Moore's actions in plea negotiations. It takes two parties to negotiate, and there is no indication anywhere in this record that somehow Mr. Moore alone was responsible for the time taken to reach a plea agreement in this case. In fact, to the contrary, the state was still amending its charges on January 4, 2008, 16 months after the initial arrest. R 34. If anything, the state's dilatory research into whether it should charge this offense as a first, second, or third DUI appears on the record to be a far greater cause of delay than any action on Mr. Moore's part.

Like the first reason, negligence on the part of the state in preparing its case, this second

reason, the waiver of and then re-invocation of a jury trial right and plea negotiations, does not weigh against Mr. Moore. Even if Mr. Moore had never re-invoked his right to a jury trial, there would have been a speedy trial violation. There was no reason why the trial court needed to change the February 21, 2007, trial date simply because Mr. Moore waived his right to a jury trial on January 23.

The final reason cited by the district court for the delay was to accommodate the schedule of a peace officer witness for the state. The district court declined to find that this part of the delay could be weighed against the state, citing *Davis*. The district court wrote, "In *Davis*, the court could not attribute an ambiguous scheduling issue [based on witness availability] to the State without more indication on the record." R 111. This, however, is a mis-reading of *Davis*.

In *Davis*, the Court of Appeals first noted the enormous difference between a witness being inconvenienced and being unavailable. While the first would not be a good reason for a delay, the second would. *State v. Davis*, 141 Idaho at 837, 118 P.3d at 170. The Court of Appeals then wrote:

In *Davis*'s original prosecution, the district court found that the reason for the delay in bringing *Davis* to trial was based on the convenience of the witnesses, was weak, and reflected poor communication between the state and its witnesses. However, the district court found that there was no evidence that the state held a motive to delay in substantial fashion, harass, or forum-shop by failing to promptly prosecute *Davis*. *We conclude that there was no justification to excuse the ten-month lapse between Davis's arrest and the dismissal of the original charge but that the reason for that delay gravitates towards negligence. Thus, although not weighed as heavily against the state as a bad-faith delay, the delay in the original prosecution is attributable to the state.*

Id (emphasis added). See also, *State v. Clark*, 135 Idaho 255, 260-1, 16 P.3d 931, 936-7 (2000)

(Accommodation of schedule of complaining witness who was traveling out of state did not

constitute good cause for a delay).

In *Davis*, the Court of Appeals did, in fact, attribute the delay due to witness convenience to the state. Likewise in this case, the court should have attributed the delay due to witness convenience to the state. The only notation in the record regarding the witness issue is on the court minutes for January 12, 2007. In those minutes, it is written: "Per Marjorie Set on officer schedule." R 24. The burden is on the state to show good cause. *State v. Lund*, 124 Idaho 290, 292, 858 P.2d 829, 831 (Ct. App. 1993). A record indicating only that the trial is to be set per an officer's schedule does not establish in any way witness unavailability. Rather, it appears to suggest witness convenience, because if the officer was truly unavailable the notation would have stated something like "set for time after officer's surgery" or some such specific time frame. As in *Davis*, the delay attributable to the officer's schedule, though perhaps not weighted as heavily as a bad-faith delay, nonetheless weighs against the state.

There were three reasons found for the delay in getting this case to trial: 1) state negligence in researching the case; 2) Mr. Moore's waiver and then assertion of his right to a jury trial; and 3) witness schedule. One of these, the waiver and re-invocation of the right to a jury trial was a non-reason both because the six month statutory period allows for pre-trial motions and because the trial was delayed far past the statutory speedy trial time long before Mr. Moore ever re-invoked his right to a jury trial. The other two reasons weigh against the state. Given that, it cannot be said that there was a good reason for the delay.

c. Assertion of the Right to Speedy Trial

In considering Mr. Moore's assertion of his right to a speedy trial, the district court said it would not assume an outright waiver of the right, but noted that several trial dates were set well

past the speedy trial deadline before Mr. Moore moved to dismiss.³ However, while this is true, Mr. Moore did move to dismiss for speedy trial violations on January 10, 2008, 18 months after his initial arrest. Yet, the motion to dismiss was not even decided until July 11, 2008. R 36, 112. So, there was a delay of six months just from the time he filed his motion to the decision on the motion. Even if Mr. Moore is somehow penalized and denied speedy trial rights for the period before he filed his motion to dismiss, there was still a substantial delay in setting his case for trial after his motion was filed. That fact should weigh in favor of finding a violation of the constitutional right to speedy trial.

d. Prejudice

This district court recognized that the delay in trying Mr. Moore caused him anxiety and uncertainty. R 111-2. And, indeed, such prejudice can weigh in favor of a finding of a speedy trial violation. As the *Davis* court stated, negligence is not automatically tolerable simply because the accused cannot demonstrate exactly how it has prejudiced him or her. *State v. Davis*, 141 Idaho at 837-8, 118 P.3d at 169-70, citing *Doggett*, 505 U.S. at 657, 112 S.Ct. at 2693-94.

The *Barker* factors, length of delay, reason for the delay, assertion of the right to speedy trial, and prejudice, require a finding that there was a violation of the federal and state constitutional rights to speedy trial. The district court order finding to the contrary must now be reversed and the matter remanded for dismissal.

³ It may be that Mr. Moore invoked his right to speedy trial at his initial arraignment. He has moved to augment the appellate record with the videotape of that arraignment. Counsel will review that tape when it becomes available and alert the Court to its contents either through briefing or argument.

3. *The 18 Month Delay Also Violated the Statutory Right to a Speedy Trial.*

The delay in this case violated the state and federal constitutional rights to a speedy trial and the order denying the motion to dismiss must be reversed. In addition, in Idaho, I.C. § 19-3501 supplements the constitutional protections and any case not tried prior to the expiration of the six month time limit must be dismissed absent a showing of “good cause” by the state. *Id.*; *State v. Clark*, 135 Idaho 255, 257, 16 P.3d 931, 933 (2000).⁴ Given there was no good cause for the delay in this case, the delay also violated the statutory right to a speedy trial.

The initial question raised in this case by the state was whether the six month time limit of the statute “renewed” itself when the state filed an amended complaint increasing the DUI charge from a misdemeanor to a felony. R 85. While noting that the issue would be one of first impression, the district court found no language to support a “renewal” of the speedy trial limit. R 109.

The state looked to *State v. Horsely*, 117 Idaho 920, 792 P.2d 945 (1990), to support its position that the amendment of the complaint restarted the statutory speedy trial period. However, the district court was correct in its analysis that *Horsely* involved a complaint that had been dismissed and refiled, not amended, and that no language in the case would support a renewal of the time limit based only upon the amendment of a complaint. And, in fact, *State v. McKeeth*, 136 Idaho at 627, 38 P.3d at 1283, states “[t]he time limitation is not renewed absent a formal dismissal and refiling of the original charges.” In *McKeeth*, the Court of Appeals held

⁴ Although the district court order does not specifically separate the requirements of the federal and state constitutions and those of I.C. § 19-3501, the court later stated that its analysis was intended to apply to both the alleged constitutional violations and statutory violation. Tr. 8/6/08 p. 40, ln. 10-21.

that the amendment of a misdemeanor complaint did not restart the statutory speedy trial time clock. Likewise here, the state's amendment of the charges did not restart the statutory speedy trial clock.

The statute requires "good cause" for a delay past six months. Analysis of good cause may take into account the *Barker* factors, but it is not defined by those factors. As set out in

Clark:

... a thorough analysis of the reasons for the delay represents the soundest method for determining what constitutes good cause. We therefore conclude that good cause means that there is a substantial reason that rises to the level of a legal excuse of the delay. Because there is not a fixed rule for determining good cause for the delay of a trial, the matter is initially left to the discretion of the trial court.

But ... the reason for the delay 'cannot be evaluated entirely in a vacuum.' The good cause determination may take into account the factors listed in *Barker*. The *Barker* factors, however,

Considered only as surrounding circumstances ... are important, if at all, only insofar as they bear on the sufficiency of the reason itself. The shortness of the period, the failure of the defendant to demand a speedy trial, and the absence of prejudice are legitimate considerations only insofar as they affect the strength of the reason for the delay. This means that, to whatever extent the delay has been a short one, or the defendant has not demanded a speedy trial, a weaker reason will constitute good cause. On the other hand, if the delay has been a long one, or if the defendant has demanded a speedy trial, or is prejudiced, a stronger reason is necessary to constitute good cause.

[*State v. Peterson*], 288 N.W.2d 332, 335 (Iowa 1980).

State v. Clark, 135 Idaho at 260, 16 P.3d at 260 (citations omitted).

In this case, the primary reasons for the delay were state negligence in researching the case and the desire to set the case around a peace officer's schedule. While the district court noted that Mr. Moore's decision to reinvoke his right to a jury trial might have played a part in

the delay, that re-invocation did not occur until the case was already six months past the statutory time limit, so whatever minimal role Mr. Moore played should not have affected the statutory analysis.

State negligence and the desire to accommodate a peace officer's schedule are not reasons which amount to good cause for missing the statutory deadline. The other *Barker* factors only go to affect the strength of the reason for the delay. *Id.* Here, there was no good reason for the delay. The extreme length of the delay, 22 months by the time the court denied the motion to dismiss, is disturbing, and if the state had had a weak reason for the delay, such a long delay might overcome that reason so as to require dismissal in any event. However, given there was no good reason at all, the length of the delay makes the situation neither better nor worse insofar as dismissal is required in any event. Likewise, given there was no good reason for the delay, whether Mr. Moore did or did not demand speedy trial sooner or later, or whether he suffered more or less prejudice than any other person required to spend nearly two years of his life awaiting a trial setting is immaterial. When there is no good cause for a delay, the presence or absence of the remaining *Barker* factors can neither strengthen or weaken it. When something does not exist, it cannot be increased or decreased.

Because there was no good cause for the delay past the statutory time limit of six months, the district court should have dismissed the case.

B. If Relief is Granted in S.Ct. No. 35486, This Case should be Remanded for Further Proceedings.

Both at the time the guilty plea was entered and at sentencing, the district court and Mr. Moore agreed that if his DUI conviction in case No. 35486 is reversed because the North Dakota

prior conviction should not have been used to make the offense a felony, then this case would return to the district court either for dismissal or withdrawal of the plea. Tr. 12/1/08 p. 78, ln, 1-6, p. 79, ln.2-14, Tr. 12/31/08 p. 98, ln, 12-23.

Mr. Moore has asked that this case be consolidated with case No. 35486 and he incorporates all briefing submitted on his behalf in that case into this case in full.

He therefore requests that if relief is granted in case No. 35486, that this case be remanded to the district court for further proceedings as intended by the district court.

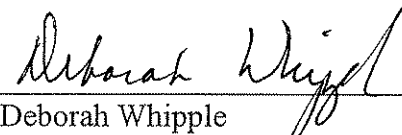
V. CONCLUSION

For the reasons set forth above, Mr. Moore requests that this Court find that the district court erred in denying his motion to dismiss for constitutional and statutory speedy trial violations.

Mr. Moore also requests for the reasons set forth in case No. 35486, that if relief is granted in that case, this case also be remanded for further proceedings as intended by the district court.

Respectfully submitted this 17th day of August, 2009.

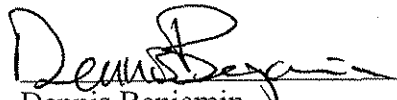

Dennis Benjamin


Deborah Whipple
Attorneys for Albert Moore

CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of August, 2009, I deposited in the United States mail, two true and correct copies of the foregoing, postage prepaid addressed to:

Office of the Attorney General
P.O. Box 83720
Boise, ID 83720-0010


Dennis Benjamin